No. 97-2011

In The

Supreme Court of the United States

October Term, 1997

IN RE ROBERT C. HILLIARD,

Petitioner.

On Petition For Writ Of Certiorari To The Supreme Court Of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner's Statement of the Case mischaracterizes the factual background in this case, and Respondent respectfully offers this summary of the proceedings below.

A. Proceedings in the Trial Court.

Petitioner filed seventeen lawsuits in order to have his overseas mass toxic tort case heard by a particular judge in violation of a local rule requiring the random assignment of cases and a state rule prohibiting the filing of groundless suits in bad faith. (App. 19-20; 38-42; 48-49; 72-73; 100-104; BIO.App. 1), Respondent, Judge of the 319th District Court of Nueces County, issued a "show cause" order that gave Petitioner more than a month's notice of a hearing to consider sanctions. (App. 80-83). After mandamus efforts failed, Petitioner appeared at the hearing without objecting to the judge hearing the sanctions matter and without complaining that the standards for criminal contempt were not being satisfied. (App. 36-37). Evidence was presented and arguments were made without any personal attacks. (App. 36, *et seq.*). Approximately two months later, Respondent issued his order making findings of fact and concluding that the Texas Rules had been violated and issuing sanctions. (App. 99-106).

1. Petitioner Filed 17 Substantially Identical Suits Seeking a Particular Judge.

On August 30 and 31, 1995, Petitioner filed 17 substantially identical suits. (App. 38-42; 48-49; 100-104). The defendants were the same in each suit. The allegations were the same in each suit. The only difference between the suits were the named plaintiffs. The first suit was filed in the 319th District Court. Within 33 minutes of filing the original lawsuit, another seven cases were filed. (App. 100-101). Apparently dissatisfied with the assignment of the cases, Petitioner returned the next day to file nine cases within the span of one hour and twenty-three minutes. (App. 102-103). The last suit was filed in the court in which the Petitioner desired to have the case heard – the 105th District Court. (App. 72-73; 103; 105). Petitioner had requested that no service of citation proceed in any of the suits. (App. 46; 100.). Thus, the defendants were not even made aware of the plaintiff's multiple filings. Then Petitioner filed "notices of nonsuits" in each of the "undesirable" 16 cases, without even notifying the defendants that those lawsuits had been filed. (App. 39-41; 103). Petitioner amended his petition in the 105th District Court to add several hundred additional plaintiffs and then requested service of citation on the defendants. (App. 41-42; 103).

2. Violated Rules.

Local Rule 3 provides for the random assignment of cases among the eight district courts in Nueces County, Texas. (App. 19-20). Despite Petitioner's repeated insistence on his innocence, he admitted that he made public

statements and reported in the news media that the above described "multiple-filings-followed-by-nonsuits" scheme was designed and utilized to get this overseas mass toxic tort case before a particular district judge. (App. 72-73). Thus, it is clear that Petitioner was consciously seeking to violate Local Rule 3 insofar as it requires random assignment of cases. (App. 12-13).

Furthermore, Texas Rule of Civil Procedure 13 requires that attorneys signing pleadings certify that the pleadings they are filing are not groundless or brought in bad faith or brought for the purpose of harassment. (BIO.App. 1). The Petitioner's filing of 16 lawsuits which were immediately nonsuited by Petitioner raises a reasonable inference that these suits were groundless or brought in bad faith and therefore filed in violation of Rule 13. That rule further provides that, "If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion *or upon its own initiative*, after notice and hearing, shall impose an appropriate sanction available under Rule 215-2b, upon the person who signed it, a represented party, or both." (BIO.App. 1).

The sanctions order found that Petitioner, by his above described actions, knowingly violated these rules. (App. 104-05). That order also noted the deprivation to the defendants of their rights by virtue of Petitioner's specific failure to obtain service upon defendants, coupled with the immediate nonsuit of the unserved lawsuits. (App. 104-05).

3. The Show Cause Order.

Upon discovering this scheme perpetrated upon his docket, Judge Bennett issued an order abating the nonsuit requested by Petitioner. (App. 80). His order set a hearing relating to transfer and consolidation of the cases, and ordered counsel to show cause why he should not be sanctioned for violation of the rules. (App. 82-83). Though the rules allow for the transfer of cases (App. 19-20), that such a remedy exists does not foreclose the imposition of sanctions. Petitioner cites no authority for the proposition that transfer of a case is the exclusive remedy for misconduct. Indeed, Petitioner offers no case interpreting the rules to allow transfer in similar circumstances.

The "show cause" order gave Petitioner more than a month's notice of the hearing. (App. 82-83). The show cause order gave Petitioner notice that sanctions were being considered for the misconduct described above. Petitioner challenged the order by filing a motion for leave to file a petition for writ of mandamus in the intermediate state appellate court, which was rejected. (App. 104).

4. The Hearing.

Petitioner, represented by counsel, appeared and testified at the "show cause" hearing. (App. 34-35; 48). Petitioner's counsel began the hearing with objections; however, Petitioner never objected that a different judge should be hearing the matter nor did Petitioner move for the appointment of a different judge. (App. 36, *et seq.*). Furthermore, Petitioner never complained that, because

this was allegedly a criminal contempt matter, the state carried the burden of proof of proving misconduct beyond a reasonable doubt. *Id.*

Petitioner admitted to the filing of the 17 lawsuits and the nonsuit of 16 of the cases. (App. 48-49). Petitioner also admitted that this scheme was for the purpose of obtaining a particular district judge to hear the case. (App. 72-73).

The hearing was conducted in a dignified question and answer format. (App. 35-79). At one point Petitioner became disrespectful of the Court and he recognized this and promptly apologized. (App. 73; 75). Indeed, Petitioner's repeated assertions that Judge Bennett "took personal" Petitioner's misconduct is nowhere reflected in the record.[1] Petitioner's own testimony admits Judge Bennett's impartiality. (App. 76).

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[1] This Court discussed the effect of a judge's personal feelings regarding a contemnor in *Ungar v. Sarafite*, 376 U.S. 575 (1964). In *Ungar*, this Court held that the record in that case "does not leave us with an abiding impression that the trial judge permitted himself to become personally embroiled with petitioner." *Id.* at 586. In that case, the trial judge had gone as far as calling the contemnor "not only contemptuous, but disorderly and insolent," *id.* at 580, and accused the contemnor of "malingering," *id.* at 597. This Court then proceeded to uphold a finding of contempt.

In a case such as the one at bar – where a judge made no commentary whatsoever and where the record is completely absent of any evidence of bias – a defendant should not be able to allege bias on appeal in an effort to overturn a finding of contempt. As in *Ungar*, the hearing before Judge Bennett "was conducted dispassionately and with a decorum befitting a judicial proceeding." *Ungar* at 587.

The hearing is perhaps most significant insofar as it reveals quickly and clearly that Petitioner failed to preserve the argument currently being made to this Honorable Court. Petitioner never objected that a different judge should be hearing the sanctions matter, (App. 34-79; 90-98), though he spends several pages in his petition complaining that Judge Bennett should not have adjudicated the matter.[2] Furthermore, Petitioner *never* objected that the Court was imposing criminal instead of civil sanctions, and therefore the evidentiary standard should be on the state to prove his guilt "beyond a reasonable doubt," *id.*, though he repeatedly asserts in his petition that should have been done.

At the hearing, and in his reply to the "show cause" order, Petitioner complained that the Trial Court lacked jurisdiction because (1) Petitioner had filed the "notice of nonsuit," and (2) because the cases had been removed to federal court. *Id.* Furthermore, Petitioner complained of lack of due process based on the alleged lack of adequate notice in the show cause order. *Id.* However, the arguments made in this Court about "criminal sanctions" and a burden to prove guilt "beyond a reasonable doubt" were not raised in the Trial Court, and indeed were never

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[2] In other cases before this Court, contemnors had objected when a judge, who witnessed the original contemptuous conduct, later adjudicated the contempt proceeding. *See, e.g., In Re Murchison*, 349 U.S. 133, 135 (1955); *Ungar v. Sarafite, supra*, 376 U.S. at 581. In *Ungar*, this Court expressly stated that this issue was only being addressed because the issue had been preserved in a lower court. *Ungar*, 376 U.S. at 583. As this issue was not raised in the Trial Court, this Court should refuse certiorari.

raised in the Thirteenth Court of Appeals, (App. 107-132), nor in the Supreme Court of Texas. (App. 150-160).

Furthermore, Petitioner repeatedly complains that he was not informed as to the amount of the sanctions being contemplated at the November 10th hearing, though the record clearly indicates that Petitioner was informed of the specific sanctions on that day. (App. 79). Petitioner made no effort to add testimony, have the matter heard or reheard by a different judge, nor complained about the burden of proof, before the Judge issued the sanctions order, almost two months later. (App. 99).

B. The Appeals.

The Thirteenth Court of Appeals agreed with Petitioner that the Trial Court did not have jurisdiction because Petitioner had filed a notice of nonsuit. Even though it had concluded there was no jurisdiction, the appellate court offered dicta concluding that due process was violated based on the "separation of powers" argument that had first been raised at the Court of Appeals. (App. 12-13; 138-39). It is relevant to note that not a single federal case was cited by Petitioner when seeking review from the Court of Appeals, and the "criminal sanctions burden of proof" argument, now made, was never mentioned. (App. 112-114; 127-131).

The Texas Supreme Court, consistent with various of its opinions, held that the Trial Court had jurisdiction because there had been no order of dismissal after the notice of nonsuit. (App. 6-8). Furthermore, the Texas Supreme Court held that the Trial Court continued to have jurisdiction over the sanctions issues, though the

case had been removed to federal court. (App. 8-12).[3] Petitioner no longer challenges the Trial Court's jurisdiction. Instead, Petitioner challenges the Texas Supreme Court's holding that due process was not violated. Petitioner complains that the Texas Supreme Court "wholly failed to address the due process implications . . . ". (Petition for Writ of Certiorari, p. 15). However, in making such attack, Petitioner ignores that the only due process challenges being made by Petitioner were indeed addressed by the Texas Supreme Court.

Specifically, the Texas Supreme Court: (1) noted the inherent power to discipline attorney misconduct, (2) cited counsel's admitted abuse of the judicial process, and (3) explained that adequate notice of the Court's intent to consider sanctions was given. (App. 12-13). This discussion by the Texas Supreme Court specifically addressed Petitioner's limited due process challenge, which only challenged the Trial Court's authority to issue *sua sponte* sanctions and the notice provided by the show cause order. (BIO.App. 22-26).

REASONS FOR DENYING THE WRIT

The petition's factbound claim that the due process clause was somehow violated should be denied for a variety of reasons, including:

[3] The cases had been removed to the federal district court; they were later dismissed based on the doctrines of comity of nations and *forum non conveniens*. Such dismissal was affirmed. *See Flores v. Southern Peru Copper Corp.*, 113 F.3d 540 (5th Cir. 1997).

a. Complaints about Respondent hearing the sanctions matter were not preserved.

Petitioner never requested that a judge, other than Judge Bennett, conduct the hearing on the show cause order. (App. 34-79; 90-98). Almost the entirety of Petitioner's petition is dedicated to characterizing Judge Bennett as having acted as the investigator, complainant, prosecutor, judge, and beneficiary[4] in this case. However, Petitioner ignores that he never objected to Judge Bennett hearing this matter. As this Honorable Court has explained:

> "If the claim was not raised or addressed in federal proceedings, below, our usual practice would be to decline to review it."

Gray v. Netherland, 518 U.S. 152, 116 S.Ct. 2074, 135 L.Ed.2d 457 (1996); *see also Yee v. Escondido*, 503 U.S. 519,

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[4] Respondent objects to Petitioner's characterization that Respondent has control over or otherwise derives any benefit from the sanction. (Petition pp. 24-25). Contrary to Petitioner's assertion, Respondent did not order the sanction "awarded [to] his court." (Petition p. 24). Rather, the sanction was made payable to the "Clerk of the Court," who collects such sanctions for Nueces County – not the 319th District Court. There is no evidence before this Court that Respondent has any control over the funds or that Respondent was a "beneficiary," as asserted by Petitioner. This Court has noted that, where fines make up only a small portion of the budget or salary of a public official and are paid to the governmental unit generally and not to that official or his office, the potential for bias "is exceptionally remote." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 250 (1980) (addressing bias of administrative official charged with prosecutional-type duty of assessing fines). The bias in this case is even more remote.

533, 112 S.Ct. 1522, 1531 (1992). Indeed, within the specific context of contempt, this Court has recognized that before a complaint about the Trial Judge may be considered by this Court, Petitioner-Contemnor must have raised the challenge to the Judge hearing the contempt at the trial court. *Ungar v. Sarafite, supra,* 376 U.S. at 581, 583. Because Petitioner did not raise this issue below, certiorari should be denied.

b. Complaints related to the burden of proof and "criminal contempt"[5] were not preserved.

Petitioner repeatedly asserts that the sanction imposed was a "criminal sanction" and therefore the state should have been required to carry the burden of proof of showing his guilt beyond a reasonable doubt. Again, however, such claim is not preserved. This contention was not made at the Trial Court (App. 34-79; 90-98), was not made at the Court of Appeals (App. 107-132), and was not even made at the Texas Supreme Court. (App. 150-160). Nevertheless, Petitioner would have this Court

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[5] Respondent does not agree with Petitioner's contention that a "criminal" sanction was imposed. Indeed, the sanction was relatively minor in light of the purported multimillion dollar toxic tort case involving 500 plaintiffs Petitioner was pursuing. Further, Petitioner's admitted payment of $2,700 in filing fees (App. 71-72), to engage in this scheme, evidences that the sanction of $10,000 to Petitioner is trivial. It is relevant to note that Petitioner is not a small solo practitioner, but rather has 20 employees. (App. 53). Additional discussion of this issue should not be required in light of the Petitioner's failure to preserve the point.

reverse the Texas Supreme Court premised upon this argument that has never even been presented to the state courts. Such appellate ambush is obviously inconsistent with this Honorable Court's certiorari practice.

c. There are no conflicting cases nor does this case involve statutory interpretation.

Petitioner fails to identify any conflicting opinions nor any statute that he claims to be in violation of the federal constitution. Instead, Petitioner's complaint is an amorphous assertion of due process violations applied in this particular circumstance with obviously unique facts. This factbound inquiry is not worthy of certiorari.

d. The Trial Court's order of sanctions was proper.

In the case before the Court, the Petitioner was engaged in flagrant abuse and intentional disregard of local rules designed to properly allocate and distribute cases within Nueces County.[6] (App. 12-13; 99-106). Inherent power to sanction for such abuse has been recognized by courts throughout Texas. *See Eichelberger v. Eichelberger*, 582 S.W.2d 395, 398-399 (Tex. 1979); *Lawrence v. Kohl*, 853 S.W.2d 697, 700 (Tex.App. – Houston [1st Dist.] 1993, no writ); *Kutch v. Del Mar College*, 831 S.W.2d 506 (Tex.App. – Corpus Christi, 1992 no writ). Furthermore, this Honorable Court has recognized such inherent

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[6] Petitioner's contention that there was no *actus reus* is inexplicable in light of the misconduct described above.

powers as exercised by the Trial Court. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991).

Such inherent power includes the power to "discipline attorneys who appear before [the court]." *Id.* at 43, 111 S.Ct. at 2132 (quoting *Ex Parte Burr*, 22 U.S. (9 Wheat), 529, 531, 6 L.Ed. 152 (1824)). Indeed, this Court in *Chambers* recognized that courts generally may act sua sponte in imposing sanctions under the rules. *Id.* at 43, 111 S.Ct. at 2132. Courts on occasion will act on their own initiative. *See, e.g., Ungar v. Sarafite*, 376 U.S. 575, 583-588 (1964) (trial court holding witness in contempt upheld); *Sacher v. United States*, 343 U.S. 1, 11-12 (1952) (federal law on criminal contempt does not limit judge to role as "an accuser or complaining witness in a proceeding before another judge"); *Markwell v. County of Bexar*, 878 F.2d 899, 900 (5th Cir. 1989) ("*Sua sponte*, the court imposed on Myers a fine of $1,000 in Rule 11 sanctions for filing the two motions, and ordered that Myers not charge his client for any time spent in filing them."); *Jaen v. Coca-Cola Co.*, 157 F.R.D. 146, 149 (D.Puerto Rico 1994) (The Trial Court sanctioned attorneys on both sides of the case "to remind the attorneys of their duties as officers of the Court, as well as to ensure that the direct Orders of the Court would be followed in the future."); *Resolution Trust Corporation v. Dabney*, 73 F.3d 262, 265 (10th Cir. 1995) ("The district court then requested briefs from both parties addressing any factors appropriate to the court's determination of the amount of a proper sanction that will deter future misconduct.' "); *Marley v. Wright*, 968 F.2d 20, 1992 WL 149922 (10th Cir. 1992) ("The district court *sua sponte* issued an order to show cause why sanctions

should not be imposed upon Marley for suing Wright, Harbour and Fowler.").

Due process requires that the court give notice of its intention to consider *sua sponte* sanctions, and that the offending party be given an opportunity to be heard. *Ungar v. Sarafite, supra,* 376 U.S. at 589 ("show cause" order and hearing provided adequate notice and opportunity to be heard); *Julian v. Zeringue,* 864 F.2d 1572, 1575 (Fed.Cir. 1989) ("If the court intends to sanction an attorney *sua sponte,* due process is satisfied by issuance of an order to show cause why sanctions should not be imposed and by providing an opportunity to respond."); *Braley v. Campbell,* 832 F.2d 1504, 1514 (10th Cir. 1987) ("When the court intends to consider such sanctions *sua sponte,* due process is satisfied by issuance of an order to show cause why a sanction should not be imposed and by providing a reasonable opportunity for filing a response."). This was not a case in which the Trial Judge imposed sanctions without the benefit of notice and an opportunity to be heard.

The Petitioner was given notice via the Court's October 2, 1995 order abating the dismissal and setting the hearing on sanctions. (App. 80-83). The Petitioner responded. (App. 90-97). On November 10, 1995, the hearing on sanctions was heard, and Petitioner had an opportunity to present arguments and defend himself. (App. 34, *et seq.*). Sanctions were not immediately imposed. Instead, a thoughtful order detailing the findings and conclusions of the Court was made on January 4, 1996. (App. 99-106). Due process was satisfied insofar as the sanctioned parties were given notice and an opportunity to be heard.

It is true that the Trial Court initiated the consideration of sanctions and inquired about the misconduct at the "show cause" hearing. However, in this action the defendants were never served. Additionally, the Plaintiff/Petitioner subsequently filed a "notice of nonsuit". The defendants' attorney did appear at the hearing on sanctions, pursuant to the Court's order. (App. 37). The defendants made objections to the actions of the Plaintiffs' attorney, stating that such actions were an abuse of the system, constituted forum shopping, and adversely affected the rights of the defendants. (App. 78). Yet, these defendants did not want to make a general appearance and file motions for sanctions because, having removed to federal court, it was their position they were no longer parties to the case. They were never served and the Plaintiff had filed a notice of nonsuit. Therefore, there was no party available to pursue sanctions. In this unique circumstance,[7] the adverse litigant is not going to be the proponent of sanctions. No one would enforce the rules of court and protect the system from an abuse of process unless the Judge conscientiously proceeds with notice of a "show cause" hearing and then gives Petitioner an opportunity to be heard.

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[7] The cases cited by Petitioner do not involve such unique circumstances where the adverse litigant has never been served and the plaintiff has filed a notice of nonsuit. Thus, the Petitioner's authorities are distinguishable. The sanctions orders in Petitioner's cases also involve many other deficiencies not present in this case. A more analogous situation existed in *Ungar v. Sarafite, supra.* In that case the court was concerned with contemptuous conduct by a witness in the case. Neither party to the underlying proceedings participated in the post-trial show cause hearing. The sanctions were upheld.

The Petitioner emphasizes the notion that the Judge acted both as prosecutor and judge, ignoring that the defendants, because they were never served and had been nonsuited, did not have an interest in actively pursuing the sanctions against the offending Petitioner. The Court acted neither as an adversary to any party, nor as an advocate of any party, but, rather, acted in protection of the orders of the Nueces County judges which were being abused by officers of the Court. *Cf. Ungar, supra.* Petitioner's position ignores that, in the absence of such vigilant judging, the system will be subject to abuses which will go unremedied and unpunished. The Petitioner should not be allowed to engage in such abusive tactics with impunity. The Trial Judge should not be relegated to sitting idly by as officers of the Court abuse the system. *Cf. Ungar, supra; Sacher, supra; Ex Parte Daniels,* 722 S.W.2d 707 (Tex.Cr.App. 1987). Good trial judges must be vigilant and conscientious enough to *sua sponte* protect the rule of law from abuses such as those committed by Petitioner.

CONCLUSION

For the above stated reasons, Respondent respectfully urges the Court to deny the Writ of Certiorari.

Respectfully submitted,

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TEXAS RULES OF CIVIL PROCEDURE

RULE 13. EFFECT OF SIGNING OF PLEADINGS, MOTIONS AND OTHER PAPERS; SANCTIONS

The signatures of attorneys or parties constitute a certificate by them that they have read the pleading, motion, or other paper; that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment. Attorneys or parties who shall bring a fictitious suit as an experiment to get an opinion of the court, or who shall file any fictitious pleading in a cause for such a purpose, or shall make statements in pleading which they know to be groundless and false, for the purpose of securing a delay of the trial of the cause, shall be held guilty of a contempt. If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, after notice and hearing, shall impose an appropriate sanction available under Rule 215-2b, upon the person who signed it, a represented party, or both.

Courts shall presume that pleadings, motions, and other papers are filed in good faith. No sanctions under this rule may be imposed except for good cause, the particulars of which must be stated in the sanction order. "Groundless" for purposes of this rule means no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law. A general denial does not constitute a violation of this rule.

The amount requested for damages does not constitute a violation of this rule.

NO. 96-0598

IN THE SUPREME COURT OF TEXAS

THE HONORABLE MAX BENNETT, JUDGE OF THE 319TH JUDICIAL DISTRICT COURT, NUECES COUNTY, TEXAS,

RELATOR

vs.

THE THIRTEENTH COURT OF APPEALS,

RESPONDENT

****

RESPONSE OF ROBERT C. HILLIARD AND ANDREW SCHIRRMEISTER, III TO RELATOR'S PETITION FOR WRIT OF MANDAMUS

****

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CERTIFICATE OF PARTIES AND ATTORNEYS

The Relator, Respondent, and other Real Parties in Interest in this mandamus are as follows:

(1) **Relator** – Max Bennett, Judge of the 319th Judicial District Court of Nueces County, Texas, is the Judge of the Court in which the underlying lawsuit, styled

Timoteo Aguilar Coaguila and Maria Magdalena Llanos, Individually and as Next Friend of Regman Aguilar Llanos, a Minor vs. Southern Peru Copper Corporation, Asarco, Inc., Cerro Trading Co., Inc., Cerro Sales Corporation, The Marmon Corporation, The Marmon Group, Inc., Marmon Holdings, Inc., GL Corporation, Phelps Dodge Overseas Capital Corporation, Phelps Dodge Corporation, Phelps Dodge Refining Corporation, Phelps Dodge Industries, Inc., Newmont Gold Corporation, Newmont Mining Corporation, Inc., Billiton B.V., and Mitsui & Co., Ltd., Cause No. 95-4900-G, was filed. Relator was the Respondent in the prior mandamus action brought by the Real Parties in Interest and decided by Respondent, Cause No. 13-96-042-CV in the Court of Appeals, Thirteenth District of Texas. See Exhibit C.

(2) **Respondent** – Court of Appeals, Thirteenth Judicial District of Texas, known also as the Corpus Christi Court of Appeals and the Thirteenth Court of Appeals. The Thirteenth Court of Appeals, sitting in a panel comprised of Justices Dorsey, Hinojosa and Rodriguez, entered its Judgment and issued its Opinion on June 13, 1996, regarding the Order on Sanction of Attorneys dated January 4, 1996. The Thirteenth Court of Appeals can be found at the 10th Floor of the Nueces County Courthouse, 901 Leopard Street, Corpus Christi, Texas 78401.

(3) **Real Parties in Interest** – Robert C. Hilliard of Hilliard & Munoz, 719 S. Shoreline, Suite 600, Corpus Christi, Texas 78401; and Andrew C. Schirrmeister, III of Zummo & Schirrmeister, L.L.P., 2603 Augustus, Suite 1200, Houston, Texas 77057. Attorneys Hilliard and Schirrmeister were attorneys for the Plaintiffs in the

underlying action. The Real Parties in Interest were represented in the court of appeals by Eric Brown and Linda Breck of Brin & Brin, P.C., 1202 Third Street, Corpus Christi, Texas 78404. Eric Brown, attorney for the Real Parties in Interest, is of Martin & Associates, 707 W. 10th Street, Austin, Texas 78701.

(4) **Plaintiffs** – Timoteo Aguilar Coaguila and Maria Magdalena Llanos, Individually and as Next Friend of Regman Aguilar Llanos, a Minor. No issue on this mandamus is relevant to the Plaintiffs.

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NO. 96-0598

IN SUPREME COURT OF TEXAS

THE HONORABLE MAX BENNETT, JUDGE OF THE 319TH JUDICIAL DISTRICT COURT, NUECES COUNTY, TEXAS

RELATOR

vs.

THE THIRTEENTH COURT OF APPEALS 319TH JUDICIAL DISTRICT COURT, NUECES COUNTY, TEXAS,

RESPONDENT

FROM THE DISTRICT COURT OF NUECES COUNTY, TEXAS, 319TH JUDICIAL DISTRICT

RESPONSE OF ROBERT C. HILLIARD AND ANDREW SCHIRRMEISTER, III TO RELATOR'S PETITION FOR WRIT OF MANDAMUS

Real Parties in Interest, Robert C. Hilliard and Andrew C. Schirrmeister, III, file this, their response to Relator's Petition for Writ of Mandamus. Real Parties in Interest will show this Honorable Court that the Thirteenth Court of Appeals was correct in its determination that Relator had entered a sanctions Order against Hilliard and Schirrmeister in a lawsuit over which it had no jurisdiction and in a matter inconsistent with his role as judge. The decision of the court of appeals was correct because the Real Parties in Interest violated no rule of procedure, the trial court had no jurisdiction over the underlying case and the Relator violated the due process rights of the Real Parties in Interest.

I. STANDARD OF REVIEW

Although the Thirteenth Court of Appeals is the proper Respondent, the focus of the Supreme Court in its review is whether the trial court abused its discretion. *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 918 (Tex. 1985).

II. STATEMENT OF FACTS

A. The Underlying Case

The underlying case from which this controversy arose was a personal injury action brought by three individuals who were harmed by emissions from the defendants' copper smelting operations in Ilo, Peru. The

plaintiffs sought monetary damages to compensate them for their injuries.

B. The Relator's Order and The Court of Appeals Ruling

The order at issue in this Original Proceeding is Relator's Order on Sanction of Attorneys dated January 4, 1996 (Exhibit A). Relator's order makes findings that the Real Parties in Interest violated the Local Rules of Practice of the district courts of Nueces County, and the Texas Rules of Civil Procedure, specifically Rules 1 and 13. The Relator ordered the Real Parties in Interest, as sanctions, to pay to the clerk of the court the sum of $10,000.00 each by February 5, 1996. The Real Parties in Interest filed a Petition for Writ of Mandamus in the court of appeals, complaining of the trial court's order. After hearing argument, the court of appeals determined that the trial court had improperly sanctioned the Real Parties in Interest (Exhibit B).

C. Events Prior To Relator's Order

On August 30, 1995, plaintiffs' counsel, Hilliard & Munoz and Zummo & Schirrmeister, filed a lawsuit that was assigned to Relator's court by the District Clerk (Exhibit C) . On the same day and on August 31, 1995, the same lawyers filed sixteen other lawsuits, each involving different plaintiffs. On September 5, 1995, each plaintiff filed a Notice of Nonsuit and abandoned his/her claims except the plaintiffs in the case pending in the 105th district court. The plaintiffs in the lawsuit filed in Relator's court and the other plaintiffs who nonsuited and

abandoned their claims were not plaintiffs in the action filed in the 105th District Court.

On October 2, 1995, Relator entered a *sua sponte* order that attempted to abate plaintiffs' nonsuit previously filed in Relator's court and the nonsuits by other plaintiffs in other courts (Exhibit D). In that order, Relator also commanded Real Parties in Interest to appear and show cause why:

> The cases filed in the other District Courts of Nueces County subsequent to August 30, 1995, at 3:24 p.m. and having the same defendants and the same factual allegations of fault should not be transferred to and consolidated in this cause in the 319th Judicial District Court; and
>
> Why plaintiff's counsel, as an officer of the court, should not be sanctioned for intentionally violating the Rules of the Court and standing orders of the District Courts of Nueces County.

On October 16, 1995, the defendants removed the dismissed cases to the United States District Court for the Southern District of Texas, including the underlying case which had been originally filed in Judge Bennett's court. (Exhibit E, Notification of Removal in No. 4900-G Timoteo Aguilar Coaguila and Maria Magdalene Llanos, Individually and as Next Friend for Regman Aguilar Llanos, a Minor vs. Southern Peru Copper Corporation, et al, 319th District Court, Nueces County, Texas. Following their removal, plaintiffs filed notices of prior nonsuit or in the alternative, Fed. R. Civ. P. 41(a), Notice of Dismissal (Exhibit F).

Prior to the hearing on Relator's sua sponte motion, Real Parties in Interest, on behalf of their clients, filed a

Petition for Writ of Mandamus against the Relator. In that mandamus action, the Plaintiffs claimed that the trial court was without authority to abate a voluntarily dismissed case. (Exhibit G). This Petition was styled *Timoteo Aguilar Coaguila and Maria Magdalene Llanos, Individually and as Next Friend for Regman Aguilar Llanos, a minor. v. The Honorable Max Bennett Judge of the 319th Judicial District Court, Nueces County, Texas;* Cause No. 13-95-00473-CV. On November 2, 1995 the Thirteenth Court of Appeals granted the Motion for Leave to File Petition for Writ of Mandamus[1] (Exhibit H).

Relator ordered sanctions against the Real Parties in Interest despite the fact that the case filed in his court had been nonsuited and removed to federal court.

III. ARGUMENT

A. The Trial Court Had No Jurisdiction Over the Case

Real Parties in Interest sought a writ of mandamus from the Thirteenth Court of Appeals to direct Relator to vacate his January 4, 1996 Order On Sanctions Of Attorneys because the trial court had no jurisdiction to act in the case. The Relator's Order clearly indicated that it was entered in the dismissed cause. Because the Relator's January 4, 1996, order was entered in a nonsuited case and had also been removed to federal court, the order was void. Mandamus was the proper method by which to attack a void judgment or order in the court of appeals.

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[1] The court of appeals dismissed the petition as moot on July 1, 1996.

Thomas v. Miller, 906 S.W.2d 260, 262 (Tex.App. – Texarkana 1995, orig. proceeding).

The underlying case was filed with the District Clerk of Nueces County on August 30, 1995. On September 5, 1995, plaintiffs filed a nonsuit of this action. At the time plaintiffs nonsuited this cause, no defendant had a claim for affirmative relief nor were any motions for sanctions by anyone pending at that time. The nonsuit was effective at the moment it was filed and results in an immediate dismissal of the entire lawsuit. *Miller v. Armogida,* 877 S.W. 2d 361 (Tex. App. – Houston [1st Dist.] 1994, writ denied). In the absence of a claim by a defendant for affirmative relief or sanctions, a trial court's refusal to enter an order of nonsuit violates a ministerial duty and should be corrected by mandamus. *Hooks v. Fourth Court of Appeals,* 808 S.W.2d 56 (Tex. 1991).

Relator argues in his Petition for Writ of Mandamus that he retained jurisdiction over the case because no dismissal order had been signed by him even though plaintiffs had exercised their absolute right to nonsuit their case. In his Petition, however, Relator fails to inform this Court that this very case was removed to federal court by the defendants on October 18, 1995. As a result of the removal, the trial court was forbidden, by federal law, from taking any further action in the underlying case. At the time the defendants completed the required steps to complete removal, Relator's jurisdiction ceased over this cause. Steamship *Co. v. Tugman,* 106 U.S. 118, 122, 1 S.Ct. 58, 60, 27 L.Ed. 87 (1882). Any action taken by a state court after removal is null and void. The jurisdiction of the state court is not restored unless and until the federal court remands the case. *E. D. Systems Corp. v.*

Southwestern Bell Telephone Co., 674 F.2d 453, 457 (5th Cir. 1982). Relator's attempt to exercise jurisdiction over the cause after it was removed to federal court was simply a void act.

Even if this case had not been removed to federal court, Relator's argument will not withstand scrutiny. The Real Parties in Interest filed a mandamus with the court of appeals on November 1, 1995, requesting the court of appeals to order Relator to vacate his order of abatement. If Relator retained jurisdiction over this case, as he argues, it is simply because he did not comply with the ministerial act of dismissal. The cases Relator cites as authority for his position are inopposite. Those cases each involve the issue of appealability. This case does not. Taken to its logical conclusion, Relator's argument would revive all Texas cases which have been nonsuited for which no order of dismissal had been signed regardless of how old that case might be. Relator's argument would also allow any Texas court to retain jurisdiction over any case for the sole purpose of extending its plenary power. This would be improper. *See Farmer v. Ben E. Keith Co.*, 907 S.W.2d 495, 496 (Tex. 1995).

B. The Relator's Inherent Authority to Sanction is Dependent Upon Jurisdiction

Relator may not base its decision upon, "its statutory, common law and inherent powers and jurisdiction" because it had no jurisdiction over the underlying case at the time it acted. *In Hjalmarson v. Langley*, 840 S.W.2d 153 (Tex.App. – Waco 1992, orig. proceeding), the court considered the issue of a trial court's inherent power to

sanction. The appellate court opined that a court's inherent judicial power does not confer jurisdiction where none preexists by statutory or constitutional grant. The inherent power of a court to sanction has its ancient roots in the court's jurisdiction and a court cannot lose its jurisdiction and yet retain it to act at the same time. *Id.* at 155. Likewise, this Court in *Eichelberger v. Eichelberger,* 582 S.W.2d 395, 399 (Tex. 1979), stated that a court has no power to take jurisdiction of a case when that jurisdiction has been granted to another court.

In this case the trial court did not retain jurisdiction. Its inherent power to sanction is reliant upon its jurisdiction. When the Relator lost jurisdiction over the case upon Plaintiffs' Notice of Nonsuit, or in the alternative, when the case was removed to federal court, it correspondingly lost its inherent power to sanction.

Likewise, the court had no power to sanction under "statutory or common law." In *Kutch v. Del Mar College,* 831 S.W.2d 506, 509 (Tex.App. – Corpus Christi, 1992, no writ), the court of appeals held that Texas courts have inherent power to sanction bad faith conduct during litigation. Again, this presupposes that a trial court has jurisdiction over the cause in which it is issuing the sanctions.

The *Hjalmarson* court recognized that its holding was in conflict with the San Antonio court in *Wolma v.* Gonzalez, 822 S.W.2d 302 (Tex.App. – San Antonio 1991, orig. proceeding). The *Hjalmarson* court stated that the *Wolma* decision can not be squared with established legal principles relating to jurisdiction and rejected its reasoning. All other courts of appeals that have considered the

issue have rejected the *Wolma* case and have adopted the reasoning in *Hjalmarson*, See e.g. *Warfield Electric v. Harry Hines Property Venture*, 871 S.W.2d 273 (Tex.App. – Eastland 1994, no writ); *Jobe v. Lapidus*, 874 S.W.2d 764 (Tex.App. – Dallas 1994, writ denied); and *Schexnider v. Scott & White Memorial Hospital*, 906 S.W.2d 659 (Tex.App. – Austin 1995, writ filed).

The trial court's *sua sponte* attempt to create jurisdiction by attempting to abate the nonsuit on October 2, 1996, likewise fails. Blacks Law Dictionary, 4th Ed., Revised, defines abate as to "throw down, to beat down, destroy, quash, to do away with or nullify or lessen or diminish". A trial court cannot abate an action that has already been dismissed or is removed to federal court. Because a plaintiff's right to take a nonsuit is absolute and because the case was removed to federal court and dismissed there as well, the Relator's attempt to abate the case is also a nullity regardless of the nomenclature used. *Greenberg v. Brookshire*, 640 S.W.2d 870 (Tex. 1982).

The trial court's attempt to retain Jurisdiction through abatement is also a nullity because there was never an attempt to reinstate the cause pursuant to Tex. R. Civ. P. 165a. This Rule does not authorize or contemplate a reinstatement on the court's own motion. It requires a verified motion filed by one of the parties within thirty days of the dismissal or nonsuit. Neither the plaintiffs nor any defendant moved for reinstatement. In addition, no signed order of reinstatement was entered by the court within 75 days of the nonsuit as required by Tex. R. Civ. P. 165a(3).

This Court, in *Remington Arms Co. v. Caldwell*, 850 S.W.2d 167, 172 (Tex. 1993), held that a trial court does have inherent and statutory power to discipline errant counsel for improper trial conduct in the exercise of its contempt powers. The trial court did not utilize its contempt powers in this case. If it did, it was not in compliance with statutory authority governing such. This Court also indicated in Remington that trial counsel are subject to disciplinary action for improper conduct. Relator did not utilize this avenue either.

In summary, the trial court could not grant sanctions under its statutory, inherent, or common law power because it had no jurisdiction over the cause.

IV. SANCTIONS ARE IMPROPER BECAUSE THE REAL PARTIES IN INTEREST VIOLATED NO RULE OF PROCEDURE

While it is clear that Relator was offended by the Real Parties in Interest actions in this case, they committed no sanctionable offense. Relator, in his order, found that the Real Parties in Interest knowingly and intentionally violated the local rules of practice which provide for random assignment of cases.

The court further found that Relator violated local rules of practice by filing notices of nonsuits which attempted to deprive the defendants of their right to present or defend all of the cases in a particular court. The court further found that the Relator violated Rule 13 by filing the underlying case in bad faith. The trial court improperly determined that the Real Parties in Interest

violated Rule 1 in that they attempted to reserve exclusively unto themselves the right to have their case heard in a particular court. The court of appeals correctly determined that Relator improperly granted sanctions. No rule of procedure or local rule was violated.

A. Rule 13 Sanctions

The trial court granted sanctions under Tex.R.Civ.P. 13, stating that the case was filed in bad faith. Rule 13 provides, in part:

> The signatures of attorneys or parties constitute a certificate by them that they have read the pleading, motion, or other paper; that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purposes of harassment. . . .
>
> No sanctions under this rule may be imposed except for good cause, the particulars which must be stated in the sanction order. "Groundless" for purposes of this rule means that no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law.

Clearly, Rule 13 allows for sanctions only if a suit is brought groundlessly **and** in bad faith. There was absolutely no evidence before the trial court to indicate that the underlying lawsuit was groundless, or brought in bad faith (Exhibit I). In fact, Relator testified that this case was brought in response to serious injuries and death of citizens of Peru which were caused by the negligence of

the defendants in the underlying case (Exhibit I at p. 24). The language of the rule indicates that in order to be sanctionable under Rule 13, the action must be groundless **and** brought in bad faith. The rule does not say that the sanctions may be imposed for an action that is groundless *or* brought in bad faith. The purpose of the rule is to check abuses in the pleading process. *Monroe v. Grider,* 884 S.W.2d 811, 817 (Tex-App. – Dallas 1994, writ denied). The language of the rule provides that no sanctions be imposed except for good cause shown and the trial court must enumerate the particulars of good cause in the sanction order. *GTE Communications Systems Corp. v. Curry,* 819 S.W.2d 652 (Tex.App. – San Antonio 1991, orig. proceeding).

The trial court's order makes no finding of groundlessness. It further fails to state facts or particulars of good cause. The evidence before the trial court showed that the pleadings were substantiated in fact and law and were brought in good faith. Further, the trial court's order does not show good cause as is required by the specific language of the rule. Courts presume that papers are filed in good faith and a party moving for sanctions for violation of Rule 13 has the burden of overcoming the presumption. See *GTE Communications Sys. Corp. v. Tanner,* 856 S.W.2d 725, 731 (Tex. 1993). Because Relator assumed the responsibility of the sanction, he correspondingly assumed the duty to overcome the presumption.

Realtor clearly abused its discretion in granting sanctions under Tex.R.Civ.P. 13 because there was no evidence before the trial court that the lawsuit brought was groundless and brought in bad faith and there was no finding by the trial court to that effect. Further, a trial

court may not impose Rule 13 sanctions after it loses jurisdiction. *Vera v. Perez*, 884 S.W.2d 182, 184 (Tex. App. – Corpus Christi 1994, no writ). In summary, the trial court's order does not show good cause for granting sanctions under Tex.R.Civ.P. 13 because there was none.

B. Rule 1 Sanctions

The trial court was also incorrect in granting sanctions against Real Parties in Interest based upon Tex.R.Civ.P. 1. Rule 1 reads, in part:

> The proper objective of rules of civil procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law.

Rule 1 has as its broad purpose a fair, just, equitable and impartial adjudication of the rights of litigants. The language of the rule does not proscribe any sanctions for the failure of a party to comply with the rule. Further, no Texas cases have interpreted the rule with respect to sanctions or the types of conduct which are violative of the rule and would warrant sanctions. In order to uphold the grant of sanctions under Tex. R. Civ. P. 1, this Court would necessarily be required to infer that some party to the litigation would be unable to get a fair trial in the district court in which the case was eventually filed. The Relator clearly abused its discretion in granting sanctions under that rule for the reason that there was no evidence before the court that Relator violated the rule or that a fair trial would not be possible in the court in which the case was eventually filed. Regardless, the rule does not

proscribe any sanctions for its violation. There was nothing before the trial court to show that Real Parties in Interest were in any way attempting to circumvent an impartial or unfair adjudication of the rights of the litigants. The defendants chose to remove their cases to federal court rather than exercise their state court rights. Again, the court's inherent power to sanction under Rule 1, if it existed, expired when its jurisdiction over the case expired. Relator clearly abused its discretion in granting sanctions under Rule 1.

C. VIOLATION OF LOCAL RULES OF PRACTICE

The Relator also found that the Real Parties in Interest had violated local rules of practice which provide for the random assignment of cases. A review of the rules which concern the random assignment of cases clearly shows that those rules were not violated by the Real Parties in Interest in this case (Exhibits J and K). Unlike the county court rules, the rules of the district court, which were made with the authority of the Relator and the other district judges, do not even proscribe sanctions for violation of the rules. Regardless, the evidence before the court did not show any violation of these rules. The district judges of Nueces County could have promulgated rules to prohibit the actions of the Real Parties in Interest, but they have not. Again, any inherent power of the court to sanction under the rules would have necessarily expired when its jurisdiction over the case expired.

V. SANCTIONS WERE UNCONSTITUTIONALLY IMPOSED

A. Due Process of Law – Notice

The trial court's sanction order is void and constitutes an abuse of discretion for which there is no adequate remedy at law because the order imposed sanctions violative of Real Parties in Interest's rights of due process under the Fifth and Fourteenth Amendments of the United States Constitution and Article One, Section 19, of the Texas Constitution. A trial court must follow the due process procedures provided by law in order to sanction an attorney or hold him or her in contempt. *Kidd v. Lance*, 794 S.W.2d 586 (Tex.App. – Austin 1990, orig. proceeding). Due process safeguards requiring adequate notice and hearing are the same whether the trial court is considering fining an attorney $500.00 for contempt of court or imposing a $10,000.00 fine and calling it a sanction. *Id.* at 588.

In *Kidd*, the trial court sanctioned a defendant for purportedly violating a motion in limine. The appellate court determined that mandamus was the only remedy available to Relator to address the sanctions issue. *Id.* at 587. The court opined that it could find no foundation whatsoever for any of the sanctions assessed against the defendant. *Id.* at 588. The Real Parties in Interest, in *Kidd*, argued that the court's order was not imposed for contempt pursuant to Tex. Gov't. Code Ann. § 21.002(d) but was a sanction under Tex. Gov't. Code Ann. § 82.061 (Vernon 1988). The court of appeals held that Relators were entitled to the due process safeguards of § 21.002, regardless.

Likewise, in this case, Respondent did not comply with the procedural requirements set forth in § 21.002 of the Government Code. Real Parties in Interest filed written objections to the court's attempt to sanction them prior to the November 10, 1995, hearing (Exhibit L). The court's October 2, 1995, *sua sponte* order, in effect, charged them with a violation of Rule 3.1 and 3.13 of the Local Rules of Administration of the District Courts of Nueces County. As Relator pointed out in writing prior to the hearing, the October 2, 1995 Order was vague and ambiguous and failed to apprise Real Parties in Interest of the act or acts alleged to be in violation of the local rules.

The trial court's orders here are an attempt to sidestep the safeguards of due process by way of nomenclature. Courts have long held that in order for a court order to be enforceable by contempt, the order must set out in clear and unambiguous language exactly what duties or obligations are imposed upon the alleged contemnor. *Ex parte Kraus*, 863 S.W.2d 104 (Tex.App. – Corpus Christi 1993, no writ). Contemptuous acts must be directly contrary to the expressed terms of a court order and when a court seeks to punish by fine, arrest, or imprisonment for disobedience of an order, that order must carry no uncertainty and must be not susceptible of different meanings or constructions. *Id.* at 106; *Ex parte Blasingame*, 748 S.W.2d 444 (Tex. 1988); *Ex parte Blanchard*, 736 S.W.2d 642 (Tex. 1987).

The Court's October 2, 1995, *sua sponte* order falls short of those due process safeguards by failing to set out with specificity the exact rules of court the Real Parties in Interest were alleged to have violated, failed to give the Real Parties in Interest notice under what authority the

court was attempting to sanction or punish them, and failed to state what the parameters of such sanctions would be. There is absolutely no justification for a distinction between sanctions and fines under the Constitution.

The trial court's Order of October 2, 1995, was nebulous. It mentioned Local Rules 3.1 and 3.13 and the Standing Orders of the District Court as giving the Court authority to require Real Parties in Interest to show cause why they should not be sanctioned for intentionally violating the Rules of Court and Standing Orders of the Court. This was clearly insufficient under the Government Code to provide notice. Rule 3 of the Local Rules of Nueces County provides that all cases are to be filed, docketed, and assigned pursuant to Rule 10(b) of the Rules of Judicial Administration of the Supreme Court of Texas and §§ 74.093, 74.121, and 75.011(i) of the Texas Government Code. Rule 3.1 allows for transfer of cases within the courts after assignment to a particular court. These rules do not, in any way, provide the courts with the authority to sanction in the event that these Rules are violated. Further, the evidence before the Respondent in its hearing on November 10, 1995, do not in any way show that the Rules were violated.

For these reasons, the Thirteenth Court of Appeals was correct in its determination that the Relator improperly ordered sanctions.

B. Constitutional Violations

The court of appeals determined that the trial court's order of January 4, 1996, was inconsistent with his role as

judge. To act as prosecutor and judge is in violation of Article 2, Section 1 of the Texas Constitution and is a violation of separation of powers under the United States Constitution. It is axiomatic in our system of jurisprudence and, under both the Texas and the United States Constitutions, that a court must be a neutral arbitrator of both the facts and the law. In this case, the Relator assumed the role of both the prosecutor and judge and as such, the Court's January 4th order is a violation of these core principles.

The record shows that no defendant in this cause was served or filed an answer prior to the plaintiff taking the nonsuit nor within the thirty days following the nonsuit in which the court retained plenary power. The "charging" instrument in this case was the court's *sua sponte* order which in itself made findings and what appear to be conclusions. At the court's hearing on November 10, 1995, the court acted as prosecutor and judge calling its own witnesses and then pronouncing judgment on its own evidence. The first time any party, other than Real Parties in Interest, appeared was at that hearing when Mr. Eduardo Roberto Rodriguez appeared on behalf of Southern Peru Copper Company, one of the original defendants.

Again, in *Kidd v. Lance*, the trial court sanctioned a party and its attorney for alleged violations of a motion in limine. The Real Parties in Interest argued that the sanction was for behavior under Section 82.061 of the Texas Government Code and thus the due process safeguards of § 21.002 of the Government Code were not applicable. The court rightfully rejected this argument

and held that such safeguards were required. Those safeguards include the right to have another judge appointed to hear the matter. At a minimum, the trial court in this cause should have followed the procedural safeguards set out in § 21.002 of the Government Code.

It would further be violative of the United States Constitution for a state court to continue to act in a case for which the federal court has exclusive jurisdiction.

VI. CONCLUSION AND PRAYER FOR RELIEF

The court of appeals was correct in its determination that Relator's order was void because of lack of jurisdiction. The court of appeals properly ruled in this case. Accordingly, this Court should deny Relator's Motion for Leave to File Petition for Writ of Mandamus and Petition for Writ of Mandamus. Real Parties in Interest further pray for such other and further relief to which they may be justly entitled.

Respectfully submitted,

By /s/ Eric Brown
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707 W. 10th Street
Austin, Texas 78701

ATTORNEY FOR REAL PARTIES IN INTEREST

CERTIFICATE OF SERVICE

I hereby certify that on this 5 day of July 1996, a true and correct copy of the foregoing Response has been sent to all parties to this proceeding.

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